

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matter of |) | |
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| Schools and Libraries |) | CC Docket No. 02-6 |
| Universal Service Support Mechanism |) | |
| |) | |
| Request for Review and/or Waiver by |) | Application No. 171039724 |
| Missoula County Public Schools |) | |
| of a Funding Decision by the |) | |
| Universal Service Administrative Company |) | |

**REQUEST FOR REVIEW AND/OR WAIVER
BY MISSOULA COUNTY PUBLIC SCHOOLS (MONTANA)
OF A FUNDING DECISION BY THE
UNIVERSAL SERVICE ADMINISTRATIVE COMPANY**

Pursuant to sections 54.719 and 54.722 of the Commission's rules,¹ Missoula County Public Schools² in Missoula, Montana (Missoula or the District) hereby respectfully requests a review of a Universal Service Administrative Company (USAC) decision to deny funding requests for Funding Year 2017.³ USAC erred in finding that Missoula's competitive bidding process was compromised because Missoula's request for proposals mentioned a specific manufacturer's name and brand.

Missoula's Request for Proposal clearly indicated that functionally equivalent equipment would be considered, and, in fact, the *winning* bidder substituted functionally equivalent equipment. It is not only permitted by the Commission's rules and orders, but in fact makes perfect sense, to specify the brand of equipment that is currently in use to give bidders the

¹ 47 C.F.R. § 54.719(b), (c); 47 C.F.R. § 54.722(a).

² Billed Entity Number 135105.

³ The FCC Form 471 number is 171039724. The FRNs are 1799105776 and 1799105847.

clearest possible idea of what the school district needs. In addition, Missoula selected the most cost-effective services and least expensive services. Accordingly, Missoula respectfully asks that the Bureau reverse USAC's decision.

If the Bureau nonetheless agrees with USAC that Missoula violated the competitive bidding rules, Missoula respectfully requests a waiver of those rules. It would be contrary to the public interest to deny more than \$60,000 in E-rate funding even though Missoula was simply trying to give bidders a clear idea of what it needed, and in fact, a bidder proposed using equivalent equipment and won the bid. The language clearly caused no confusion among bidders and resulted in the District receiving the best deal for the services it desired to purchase.

I. BACKGROUND

Missoula County Public Schools is located in Missoula, Montana. Missoula County Public Schools serves area students through nine elementary schools, three middle schools and four high schools (three in Missoula and one in Seeley Lake).

On January 11, 2017, Missoula posted its FCC Form 470 and issued a Request for Proposal for internal connections for two schools – Franklin and Lowell elementary schools.⁴ In those documents, Missoula sought bids for category 6 cabling and the associated network drops.⁵ The Form 470 noted that Missoula had “no preference” as to the manufacturer of equipment.⁶ The RFP contained language stating that the contract documents were based on the latest version

⁴ Exhibit 1. The FCC Form 470 170058485 and RFP were posted the same day.

⁵ See Exhibit 1, RFP at pg. 3 (Project Overview).

⁶ *Id.*, FCC Form 470 at 1.

of Missoula County Public School’s cabling standard, which specified that AMP NetConnect products shall be used for all components such as cabling, patch panels, and jacks.⁷

Notwithstanding that provision, the RFP specifically allowed for substitution of equipment in Section 2.02 titled “Workmanship, Substitutions and Warranty.”⁸

No substitution will be considered unless written request has been submitted by the Bidder to the Consultant and has been approved by the Owner at least seven (7) days prior to the date for receipt of bids. Each request shall include the name of the material or equipment for which it is to be substituted and a complete description of the proposed substitution. Provide original product data (no copies will be accepted) with performance and test data and any other information necessary for an evaluation.

One of the potential bidders, Blackfoot Communications (Blackfoot), submitted a list of equipment it wished to substitute to the district for consideration in accordance with RFP Section 2.02.⁹ Instead of AMP NetConnect, Blackfoot proposed to use Panduit equipment.¹⁰ The district approved the substitutions.¹¹

Missoula then received bids from three vendors on February 8, 2017—Blackfoot, Teledata Technologies (Teledata), and WeConnectMT. Missoula evaluated the bids and selected Blackfoot as the winning bidder. Blackfoot was not only the most cost-effective bidder; it also

⁷ *Id.*, RFP, Project Overview (All cable will be terminated in CommScope NetConnect outlets at the classroom and in CommScope NetConnect patch panels or punch down blocks at identified central distribution frames); section 1.06, pg. 23.

⁸ *Id.*, RFP, section 2.02, pg. 24

⁹ Exhibit 2, Blackfoot Substitution List, submitted by Communications Resources LLC, a subcontractor for Blackfoot.

¹⁰ *Id.*

¹¹ Exhibit 3, Email from Russ Hendrickson to Steve Nuckols, dated February 6, 2017. Access Consulting was the District’s E-rate consultant handling the competitive bidding process.

was the least expensive.¹² Blackfoot's bid totaled \$182,651 for the two schools; Teledata's bid was \$287,900; and WeConnectMT's bid was \$198,140.¹³ Missoula filed its FCC Form 471 for funding year 2017 on May 11, 2017.

On November 22, 2017, USAC denied Missoula's funding request because USAC found that the description of the products contained:

. . . a particular manufacturer's name, brand, products and/or services without also specifying 'or equivalent'. This is a competitive bidding violation because there is no indication that the FCC Form 470/RFP is also allowing a service provider to submit a bid for equivalent products and/or services. This undermines the competitive bidding process by eliminating the opportunity for the application to purchase an equivalent or better product that may be less expensive or to choose a less expensive service provider.¹⁴

On January 19, 2018, Missoula filed a timely appeal of USAC's funding commitment decision letter (FCDL). On May 1, 2018, USAC denied Missoula's appeal, finding that it had not demonstrated that USAC's original decision was incorrect.¹⁵ Appeals to the Commission of USAC decisions are due within 60 days.¹⁶ As such, the instant appeal is timely filed.

II. MISSOULA SPECIFICALLY ALLOWED BIDDERS TO SUBMIT BIDS USING EQUIVALENT EQUIPMENT

USAC denied Missoula's request for funding because Missoula included the name of a specific manufacturer in its RFP, noting that Missoula's RFP did not allow a service provider to submit a bid for equivalent products and/or services. But Missoula's RFP specifically did allow potential bidders to submit bids for equivalent services, as long as the vendor demonstrated that

¹² Exhibit 4, competitive bidding matrix. Section 4, worth 60 points, was the category for cost. See also RFP at pg. 39.

¹³ Exhibits 5 (Blackfoot), 6 (Teledata), and 7 (WeConnectMT).

¹⁴ See Exhibit 8, USAC Funding Commitment Decision Letter.

¹⁵ See Exhibit 9, USAC Revised Funding Commitment Decision Letter (decision on appeal).

¹⁶ 47 C.F.R. §§ 54.719(a), 54.720(b).

the equipment met the technical specifications the District had established. Missoula also noted on its Form 470 that it had no preference for the manufacturer. Therefore, Missoula complied fully with the requirements of the Bureau's *Queen of Peace Order*. USAC's denial of funding on this ground was in error and should be reversed.

In order to mitigate the risk of harm to the competitive bidding process, the Bureau used the *Queen of Peace Order* to clarify that "applicants must not include the manufacturer's name or brand on their FCC Form 470 or in their RFPs unless they also use the words 'or equivalent' to describe the requested product or service."¹⁷ In the order, the Bureau granted an appeal after finding that the "competitive bidding process was not compromised by its inclusion of a service provider name on its FCC Form 470."¹⁸ The Bureau recognized that identifying a specific vendor or brand could potentially compromise the competitive bidding process.¹⁹ In order to mitigate the risk of harm to the competitive bidding process, the Bureau clarified that applicants must not include the manufacturer's name or brand on their FCC Form 470 or in their RFPs unless they also allow vendors to propose equivalent equipment to be bid.²⁰ The *Queen of Peace Order* was thus unambiguous in its determination that an applicant is permitted to identify a specific manufacturer or brand in its FCC Forms 470 and RFPs as long as the applicant also

¹⁷ *Request for Review of a Decision of the Universal Service Administrator by Queen of Peace High School*, CC Docket No. 02-6, Order, 26 FCC Rcd 16466, para. 8 (Wireline Comp. Bur. 2011) (*Queen of Peace Order*).

¹⁸ *Id.* ¶ 1.

¹⁹ *Queen of Peace Order* ¶ 6.

²⁰ *Queen of Peace Order* ¶ 8. To illustrate compliance with the new requirement, the Bureau gave the following example: "an applicant may indicate that it is requesting bids for 'XYZ manufacturer's high-speed router model 345J or equivalent.'" *Id.*

allows vendors to submit bids for “equivalent” products or services as well, and provided that the applicant then “carefully consider[s] all of the bids received before selecting a winning bidder.”²¹

USAC’s denial of funding is clearly at odds with the *Queen of Peace Order*. Missoula specifically stated in its RFP at Section 2.02 that it would accept bids for equivalent equipment as well as for the equipment that it specifically identified.²² Missoula clearly met the requirements of the *Queen of Peace Order* by allowing bids for different brands of equipment.

In fact, not only did Missoula specifically allow bids, one vendor proposed to substitute different equipment for the equipment listed in the RFP, and Missoula approved that request. That vendor won the bid with the substituted equipment. So not only did Missoula follow the requirements in *Queen of Peace* to allow potential substitutions of equipment, but it approved the substitution when the vendor demonstrated the equipment met the District’s standards. Missoula selected that vendor as the winning bidder for the project, further underscoring the fact that there was no discrimination in the competitive bidding process against different brands of equipment. As a result, Missoula met the policy goals behind the rule – by considering an equivalent or better product that may be less expensive, and by actually selecting that less expensive product.

Therefore, USAC’s denial of funding has no support in Commission rules or precedent and is inconsistent with the *Queen of Peace Order*. Missoula thus respectfully requests that the Bureau reverse USAC’s decision.

²¹ *Queen of Peace Order* ¶ 9.

²² See Exhibit 2, pg. 24.

III. IN THE ALTERNATIVE, A WAIVER OF THE COMMISSION'S RULES IS IN THE PUBLIC INTEREST

As explained above, Missoula complied with the Commission's competitive bidding rules and with the requirements of the *Queen of Peace Order*. If, however, the Bureau agrees with USAC that Missoula somehow violated the competitive bidding rules, Missoula respectfully requests a waiver of those rules to the extent necessary to award Missoula the funding it has requested.

Any of the Commission's rules may be waived if good cause is shown.²³ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.²⁴ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²⁵

It is possible USAC believes that the words "or equivalent" must be included in the RFP, even if the RFP otherwise conveys the same policy using different words. Such a strict interpretation should not be used to deny funding when Missoula met the requirement simply using different language, and, in fact, met the policy goals behind the requirement to consider other brands of equipment.

Furthermore, the Commission has routinely waived the competitive bidding rules when the applicant has selected the lowest-cost bidder.²⁶ Blackfoot was the lowest-cost bidder when it

²³ 47 C.F.R. § 1.3.

²⁴ *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

²⁵ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

²⁶ See, e.g., *Request for Review of Decisions of the Universal Service Administrator by Allendale County School District et al.; Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, 26 FCC Rcd 6109 (Wireline Comp. Bur. 2011) (*Allendale Order*) (finding that a waiver of the

won Missoula's business for Funding Year 2017. Accordingly, even if there had been a violation of the competitive bidding rules (which, as we have explained, there was not), there was no harm to the competitive bidding process. Further, Missoula complied with the Commission's requirements by expressly permitting other manufacturers' equipment to be bid.

In short, Missoula noted it had no preference for the manufacturer on its Form 470; it unequivocally informed vendors that it would accept bids substituting equivalent equipment; vendors clearly knew that this was an option because one vendor did substitute equivalent equipment in its bid; and Missoula awarded the contract to the vendor that offered equivalent equipment, saving both itself and the E-rate program money. It would be contrary to the public interest to deny E-rate funding under these circumstances.

Commission's competitive bidding rules was in the public interest where the petitioners selected the least expensive responsive service offering).

IV. CONCLUSION

For the foregoing reasons, Missoula respectfully requests that the Bureau grant this appeal. In the alternative, Missoula respectfully asks that the Bureau waive the Commission's competitive bidding rules and any other rules to the extent necessary to grant the requested relief.

Respectfully submitted,

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Consultant for Missoula County Public Schools

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CERTIFICATE OF SERVICE

This is to certify that on this 28th day of June, 2018, a true and correct copy of the foregoing Request for Review was sent via email to the Schools and Libraries Division, Universal Service Administrative Company at the Appeals@sl.universalservice.org address.

Fred Brakeman

Fred Brakeman – District E-Rate Consultant

ATTACHMENTS

- Exhibit 1 FCC Form 470 and RFP, certified January 11, 2017
- Exhibit 2 Blackfoot Substitution List
- Exhibit 3 Email from Russ Hendrickson to Steve Nuckols, dated February 6, 2017
- Exhibit 4 Competitive Bidding Matrix
- Exhibit 5 Blackfoot's Bid
- Exhibit 6 Teledata's Bid
- Exhibit 7 WeConnectMT's Bid
- Exhibit 8 USAC Funding Commitment Decision Letter
- Exhibit 9 USAC Revised Funding Commitment Decision Letter (decision on appeal)